Office - Supreme Court, U. S.
FILED
MAY 2 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1206

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation), et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

ALLEN SPIVOCK,
JOHN L. MURPHY,
Russ Building, San Francisco, California,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit	1
Statement of Matter Involved	2
Statement of Circuit Court's Actions	9
Jurisdiction of This Court	11
Questions Presented	12
Reasons Relied on for the Allowance of the Writ	13
Brief in Support of Petition for Writ of Certiorari	21
I. Opinion of the court below	21
II. Jurisdiction of this court	22
III. Statement of the case	22
IV. Specification of Errors	22
V. Argument	23
1. Attempt to state a cause of action against "conductor", "officer" and "does"	23
2. True facts in record completely ignored	26
3. Amendment is allowed after removal and remand is then ordered	28
4. Bias of Circuit Court	32
Conclusion	32

Table of Authorities Cited

Cases	Pages
Atchison, T. & S. F. Ry. Co. v. Francom, 9 Cir., 118 F. (2d) 712 (1941)	18
Bagenas v. Southern Pacific Co., 180 F. 887	9, 24
Borden v. Zumwalt, 9 Cir., 120 F. (2d) 69	11
Cella v. Brown, 8 Cir., 144 F. 742	14, 24
Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 58 L. Ed. 544	25
Chesapeake & Ohio Ry. Co. v. Dixon, 179 U.S. 131	9
Cheyne v. Atchison, T. & S. F. Ry. Co., 9 Cir., 125 F. (2d) 49	18
Chicago, R. I. & P. Ry. Co. v. Schwyart, 227 U.S. 184	9, 13
Chicago, R. I. & P. Ry. Co. v. Whiteaker, 239 U.S. 421, 60 L. Ed. 360	9
Cray v. Hegarty, 2 Cir., 85 F. (2d) 516	11
Day v. Western Loan, 42 Cal. App. (2d) 226, 108 Pac. (2d) 702 (hearing denied by California Supreme Court in 1941)	31
Deckert v. Independence, 311 U.S. 282	11
Farmers Bank v. Atchison, T. & S. F. Ry., 8 Cir., 25 F. (2d) 23	14, 28
Forrest v. Southern Ry. Co., 20 F. Supp. 851	9
Good v. Hartford Acc., 39 F. Supp. 475 (1941)	15, 26
Grosso v. Butte Electric Ry. Co., 217 F. 422	24
Highway Const. Co. v. McClelland, 8 Cir., 15 F. (2d) 187 (cert. denied in 273 U.S. 765)	29
Hughes, Fed. Prac., Vol. 4, Secs. 2671, 2653	15
Jensen v. Safeway Stores, 24 F. Supp. 585	24
Johnson v. Missouri Pacific, 25 F. Supp. 692	14
Leonard v. St. Joseph Lead Co., 8 Cir., 75 F. (2d) 390	14, 28
Locke v. St. Louis Ry. Co., 8 Cir., 87 F. (2d) 418	14
Martin v. Norfolk & W. Ry. Co., 8 Cir., 43 F. (2d) 293	25
Morgan v. Kroger, 8 Cir., 96 F. (2d) 470	11, 14

Pages

Page v. Wright, 7 Cir., 116 F. (2d) 449 (cert. dismissed in 312 U.S. 710) 16, 30
Polito v. Molasky, 8 Cir., 123 F. (2d) 258 (1941) 15, 16, 29
Pullman v. Jenkins, 305 U.S. 534 ... 10, 12, 13, 15, 17, 23, 24, 28, 29

Rhodes v. Dierks Lumber Co., 8 Cir., 108 F. (2d) 846 (1940) 13

St. Louis Smelting v. Nix, 8 Cir., 272 F. 977 ..... 16, 30
St. Paul v. Cab Co., 303 U.S. 283 29
Schell v. Food Machinery Corp., 5 Cir., 87 F. (2d) 385 (cert. denied in 300 U.S. 679) 11
Sklarsky v. Grt. Atl., etc., 47 F. (2d) 662 15
Solanics v. Republic Steel, 34 F. Supp. 951 (1940) 16, 24
Stone v. South Carolina, 117 U.S. 430 14

Thurston v. Northwestern Fire, 9 F. Supp. 848 14
Trivette v. C. & O. Ry. Co., 6 Cir., 212 F. 641 ..... 15, 25

Wilson v. Republic Iron, 257 U.S. 92 15

Codes and Rules

Code of Civil Procedure, Section 474 ..... 8, 31

28 U.S.C.A. Secs. 71, 72 11
28 U.S.C.A. Sec. 80 ..... 16, 17, 30
28 U.S.C.A. Sec. 227 11
28 U.S.C.A. Sec. 347 (a) 11

Federal Rules of Civil Procedure, Rules 12 (h) (2), 15 (b) 16, 17, 30
Federal Rules of Civil Procedure, Rule 15 (a), (c) 31

Texts

16 Calif. Juris. 412, Sec. 23 31

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

GILBERT E. THIEL, *Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY (a corporation), et al., *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of said Gilbert E. Thiel for a review on writ of certiorari of the decision of the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

STATEMENT OF MATTER INVOLVED.

On December 30, 1940 (R. 8) plaintiff filed a complaint in the State Court for damages against said "Southern Pacific Company, a corporation, First Doe, Second Doe and Third Doe, Defendants." (R. 9.) The important paragraphs here are as follows:

"I. That plaintiff does not know the true names of defendants sued herein as 'Does' and prays leave to insert same when ascertained." (R. 9.)

Paragraph III gives February 25, 1940 as date of the accident. (R. 10.)

"IV. That at said time and shortly thereafter, said defendant Company was informed through one of its regularly uniformed *special police officers* and by other of its agents that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash; that thereupon said *special officer* remained with plaintiff on the train for some time but then, *acting in a careless and reckless manner,* left him alone and unguarded before said train started for said San Francisco.

"V. That on or about 8:30 P.M. of said date while said train was in motion at or near the boundary line between the State of Nevada and the State of California, plaintiff, while out of his normal mind and

in said highly depressed mental state, suddenly opened the window of said train and leaping out, held on to said window sill with his hands for some time before falling to the ground; that one of defendant Company's regular *conductors* on said train saw plaintiff hanging from said window but *negligently and carelessly* failed to give the stop signal until after plaintiff had fallen to the ground." (R. 11.)

"VI. That said fall was caused by the *careless and reckless conduct* of *said defendants* who, with full knowledge of plaintiff's said condition, accepted him as a passenger and then carelessly and recklessly failed to take any reasonable precautions for his safety."

Paragraphs VII, VIII and IX set forth that both of plaintiff's legs got under the train and were amputated; that his left arm is permanently out of use; and the amount of plaintiff's damages.

Then the prayer seeks "judgment against *said defendants*". (R. 12.)

Said complaint contained no allegations regarding the citizenship or residence of plaintiff or said "police officer" or "conductor" and was not drawn technically in anticipation of a petition for removal.

On January 9, 1941 (R. 8) said defendant Company filed a petition for removal to the Federal Court alleging that it was a citizen of the State of Kentucky and that plaintiff was a citizen of the State of California. (R. 16.) No mention was made of the citizenship of said "officer" or "conductor". The sole

ground for removal in said petition was diversity of citizenship between plaintiff and defendant Company. No mention was made of a separable controversy between plaintiff and some of the other defendants. Paragraph IV of said petition admitted that plaintiff received injuries "as a result of alleged negligence of petitioner *and its agents,* as appears from the *complaint* herein". (R. 17.) Paragraph V thereof alleged that it was "impossible to tell from said complaint, or otherwise, what individuals are referred to by said fictitious designations 'First Doe, Second Doe and Third Doe' or any of them". (R. 17.)

On January 17, 1941 (R. 8) an order of removal was made (R. 26) over the formal objection of plaintiff who had obtained a short extension of time (R. 24) and was diligently endeavoring to ascertain the names and addresses of said "officer" and "conductor" and proceed in the State Court. (R. 58.)

After receiving notice of filing of the record in the Federal Court on February 13, 1941 (R. 2), plaintiff's counsel telephoned to Mr. A. B. Dunne, counsel for defendant Company on February 14, 1941, requesting information regarding the names and addresses of said "officer" and "conductor" and frankly stating that he would move for remand to the State Court as he believed they were California citizens, but he was refused and told to proceed by the usual method of interrogatories. (R. 58.) This was before the year limitation which would expire on February 25, 1941. On said February 13, 1941, said A. B. Dunne obtained a stipulation extending time for defendant

Company to plead until February 24, 1941, on which day it filed its answer. (R. 2.)

In paragraph II of said answer defendant Company "admits that one of its railroad *policemen* at Reno, Nevada, was informed on February 25, 1940, and prior to the departure from Reno, Nevada, of the train on which plaintiff rode, that plaintiff had been drinking alcoholic beverage, and admits that it was a fact that he had been so drinking". (R. 30.)

In paragraph III of said answer it admits "that defendant's *conductor* on said train saw plaintiff when plaintiff was partially through said window". (R. 30.)

On March 4, 1941 (R. 2), following the suggestion of defendant Company's counsel, plaintiff served interrogatories upon it seeking the names and addresses of said "officer" and "conductor". Defendant Company then took the deposition of plaintiff and by order of Court the answers to said interrogatories were not released and filed until April 30, 1941 (R. 3), when plaintiff learned their names and addresses and citizenship for the *first* time. Portions of said interrogatories, answers thereto, and deposition appear in the record. (R. 91-96.)

Immediately thereafter, on May 5, 1941 (R. 2), plaintiff moved for remand to the State Court alleging specifically that he had just discovered the name and address of said "conductor", sued as "First Doe", and since he and the plaintiff were both citizens of California, the Federal Court had no jurisdiction. (R. 36.) At the hearing the District Court commented that defendant Company was raising a

"technical" objection and then asked for briefs on the sole question of whether said "officer" and "conductor" being alleged as "Does" in said complaint could be considered on the petition for removal and on the motion to remand.

On May 17, 1941, plaintiff thereupon asked for leave to file a proposed amended complaint (R. 37), setting forth the true names of said "officer" and "conductor" and alleging that said "conductor" was a citizen and resident of the State of California and thus clearly establishing that there was no requisite diversity of citizenship. (R. 39-43.)

On May 29, 1941, the Court denied the motion to remand and the motion to file amended complaint. (R. 49.)

Plaintiff's counsel was advised by its clerk that the Court would not state nor discuss the grounds of its ruling. However, in defendant Company's lengthy brief it was strongly argued that the cause of action against said "officer" who was a non-resident (R. 91) was separable from that against said "conductor" and therefore the Federal Court had jurisdiction over the cause involving said "officer".

Thus, on June 4, 1941, plaintiff asked for leave to file a proposed (new) amended complaint (R. 49) which was similar to said amended complaint (R. 39) with the single exception that the following was added at the end of paragraph V thereof: "that said conductor knew before said accident that plaintiff was not in his normal mind and needed watching". (R. 51.) The stated purpose of this amendment was

to *clarify* and thus eliminate any question about said "conductor's" concurrent negligence with said "officer" in bringing about plaintiff's injuries and remand was again asked. (R. 50.)

On June 17, 1941, plaintiff also filed a formal answer to petition for removal and plea to the jurisdiction of the Federal Court. (R. 54.) Said answer set forth the utter impossibility of serving said "Doe" defendants (R. 54) and that plaintiff's intent from the beginning was to sue them all as joint defendants for concurrent negligence. (R. 55.) Plaintiff also denied any fraud. (R. 56.) Said plea set forth that plaintiff described said agents to the best of his ability and information (R. 57) and refers to the diligent efforts to get said information, even from defendant Company. (R. 58.)

At the hearing of said motions, upon inquiry of plaintiff's counsel, the District Court stated that its previous ruling was on the ground of *separability of causes of action* and it then asked for further briefs on this question. Plaintiff's brief pointed out that since defendant Company's petition for removal *failed* to allege the citizenship of either said "officer" or "conductor", there was no basis for removal to the Federal Court on the ground of separable causes, as it did not appear therein that either were non-residents.

On July 11, 1941, the Court denied said motions to amend and to remand, citing authorities which make it appear that it relied mainly upon the ground that said "officer" and "conductor" were not suffi-

ciently identified as parties in the original complaint and no amendment would be allowed to prevent the bar of the statute of limitations. (R. 61.)

Since the effect of said ruling was to make it impossible to ever bring said "officer" and "conductor" in as parties because the year limitation had run on February 25, 1941, and since the precise question here of the sufficiency of the pleading to make them parties has not been passed upon by the highest State Court, and since where the removal is improper, the action, in a legal sense, is still pending in the State Court, plaintiff filed a motion in the State Court to set aside its erroneous order of removal. (R. 67.)

Defendant Company petitioned for an injunction restraining further proceedings in the State Court. (R. 61.) At the hearing, the District Court admitted that its previous rulings were in effect a *dismissal* of the action against said "officer" and "conductor" and further stated that it had no doubts about its rulings, and after denying plaintiff's request to test out in the highest State Court the sufficiency of the pleading of said complaint as stating a cause of action against said agents, and to test out plaintiff's right under California Code of Civil Procedure Section 474 to sue a defendant as "officer" or "conductor" rather than as "First Doe" or "Richard Roe" since said section allows an unknown defendant to be sued by "any name", it granted the injunction. (R. 81.)

STATEMENT OF CIRCUIT COURT'S ACTIONS.

At the start of the oral argument, and without the slightest provocation, the presiding Judge of the Circuit Court who later wrote the opinion, most severely criticized plaintiff and asked: "Aren't the Federal Courts good enough to try your case in?"

This Supreme Court has repeatedly held that where plaintiff has a legal right to join a conductor, engineer or other agents of a railroad company as joint defendants, his motives in exercising that right cannot be questioned, even though they thereby prevent removal to the Federal Court.

Chesapeake & Ohio Ry. Co. v. Dixon, 179 U.S. 131, 135;

Chicago, R. I. & P. Ry. Co. v. Schwyart, 227 U.S. 184, 193;

Chicago, R. I. & P. Ry. Co. v. Whiteaker, 239 U.S. 421, 424, 60 L. Ed. 360.

Also,

Forrest v. Southern Ry. Co., 20 F. Supp. 851, 853,

and

Bagenas v. Southern Pacific Co., 180 F. 887, 889.

At no time did plaintiff question defendant Company's motives in obtaining removal to avoid trial in the State Court and in most vigorously contesting remand.

Also, the Circuit Court immediately took the decided position that plaintiff had no right of appeal

from said injunction and was about to summarily dismiss the appeal, but then, at defendant Company's suggestion, asked for further briefs on this point, without hearing any argument whatever from defendant Company. (R. 109.) A 43-page brief was filed by defendant Company urging that plaintiff *did* have the right to appeal. In its opinion the Circuit Court has not even mentioned this point. (R. 110.)

The Circuit Court's opinion has completely ignored the fact of the discovery of the "conductor's" California citizenship for the *first* time in the Federal Court *after* removal, although this was again called to its attention in the petition for rehearing. (R. 117.)

The Circuit Court considered *only* the original complaint and held, in effect: (1) That the "conductor" could not at all be identified nor was he even intended as a party defendant and (2) That after a petition for removal is filed, *Pullman v. Jenkins*, 305 U.S. 534, 537, 83 L. Ed. 334, forever forbids any amendments, even under the peculiar circumstances here. (R. 115.)

Plaintiff has been confronted with the obstacle of so many shifting theories from both the District and Circuit Courts that he has been left sadly bewildered in his attempts to enforce what appears to be his clear legal right to proceed with his case filed in the State Court.

JURISDICTION OF THIS COURT.

1. Jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 347 (a) to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Said decision which petitioner seeks to have this Court review was entered on March 20, 1942. (R. 109.) A petition for rehearing was denied by order entered on April 15, 1942. (R. 117.)

3. This suit was commenced in the State Court but removed by defendant Company to the United States District Court (R. 13) under 28 U.S.C.A. Secs. 71, 72.

4. The decree of injunction of the District Court (R. 81) was appealed to the Circuit Court under 28 U.S.C.A. Sec. 227. It was also upon the authority of the following cases which point out that on said appeal the *whole basis* for the interlocutory injunction may be inquired into—that basis here being the District Court's denial of both motions to amend and to remand on the erroneous theory that it had jurisdiction:

Cray v. Hegarty, 2 Cir., 85 F. (2d) 516;
Morgan v. Kroger, 8 Cir., 96 F. (2d) 470;
Schell v. Food Machinery Corp., 5 Cir., 87 F. (2d) 385 (Cert. denied in 300 U.S. 679);
Borden v. Zumwalt, 9 Cir., 120 F. (2d) 69, 71;
Deckert v. Independence, 311 U.S. 282, 286-7.

QUESTIONS PRESENTED.

1. Where an original complaint filed in a State Court, names a railroad company and several "Does" as defendants, and charges one of the company's "special police officers" and "conductors" with definite and specific negligent acts causing injury to plaintiff but fails to immediately attach to them the technical words "First Doe" or "defendant", can it be properly and reasonably inferred, *on motion to remand* the case to the State Court, that said "conductor" and "officer" were intended as such "Does" and as joint defendants?

2. Where defendant Company's petition for removal to the District Court alleges that said agents are not parties defendant, and this is put in issue by plaintiff filing an answer to said petition and a plea to the jurisdiction setting forth his clear intent to make said agents joint defendants from the beginning and newly discovered evidence of their citizenship showing no diversity, and on plaintiff's motion to remand, defendant Company offers no evidence to the contrary, may the District Court completely ignore this evidence and maintain jurisdiction?

3. Did this Court intend in *Pullman v. Jenkins,* 305 U.S. 534, 537, in holding that after filing of a petition for removal, an amended complaint cannot be considered in determining the "right of removal", that plaintiff can never thereafter amend his complaint to correct technical errors, nor offer newly discovered or other evidence in the Federal Court showing that, from the beginning, there was no di-

versity of citizenship to give it jurisdiction? In other words, is Federal jurisdiction finally determined by a technical defect in the original complaint, without any right whatever to correct same after a petition for removal has been filed?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that, on motion to remand, the original complaint stated no cause of action against the "Doe" defendants or against the "conductor" or "police officer" (R. 112) is extremely technical and unfair to plaintiff as it completely overlooks the fact that at least *some attempt* was made to make them joint defendants and, at most, there was merely a *technical* defect.

(a) This harsh construction is directly in conflict with our whole modern procedure and with the following Federal decisions which urge a liberal interpretation of the complaint, *on motion to remand,* with all inferences and doubts in favor of plaintiff to permit remand, keeping in mind that the complaint need not be perfect as amendments are now freely allowed to cure technical defects:

Pullman v. Jenkins (1938), 305 U.S. 534, 543: "We are not to decide whether a flaw could be picked in the declaration on *special* demurrer."

Chicago, R. I. & P. Ry. Co. v. Schwyart, 227 U.S. 184, 194;

Rhodes v. Dierks Lumber Co., 8 Cir., 108 F. (2d) 846, 848 (1940);

Locke v. St. Louis Ry. Co., 8 Cir., 87 F. (2d) 418, 420;

Johnson v. Missouri Pacific, 25 F. Supp. 692, 693;

Thurston v. Northwestern Fire, 9 F. Supp. 848, 854.

(b) The Circuit Court relied on cases like *Cella v. Brown,* 8 Cir., 144 F. 742 (R. 114), which do not apply here because said "conductor" and "officer" were not merely "formal parties" who might be disregarded on filing a petition for removal but were clearly singled out and charged with *specific* negligent acts *causing* plaintiff's injury. (R. 10, 11.)

2. In closing its eyes and completely ignoring the true facts, *undisputed in the record* AT THE TIME OF MOTION TO REMAND, showing plaintiff's intent from the beginning to join said "conductor" and "officer" as defendants, the Circuit Court is in direct conflict with all of the following decisions which hold that on motion to remand, the Court may look into the true situation between the parties and even take evidence, especially where plaintiff files an answer to the petition for removal and a plea to the jurisdiction thus raising issues of fact which *must* be tried in the *District Court only:*

Stone v. South Carolina, 117 U.S. 430, 432;

Farmer's Bank v. Atchison, etc., 8 Cir., 25 F. (2d) 23, 27;

Leonard v. St. Joseph Lead Co., 8 Cir., 75 F. (2d) 390, 395;

Morgan v. Kroger, 8 Cir., 96 F. (2d) 470, 473;

Polito v. Molasky, 8 Cir., 123 F. (2d) 258, 261 (Nov. 1941);
Sklarsky v. Grt. Atl., etc., 47 F. (2d) 662, 664;
Hughes, Fed. Prac., Vol. 4, Secs. 2671 and 2653 and cases cited.

Also, the burden of proof is on the petitioning defendant and where, as here, the issue is not tried, remand should be ordered.

Trivette v. C. & O. Ry. Co., 6 Cir., 212 F. 641, 643;
Wilson v. Republic Iron, 257 U.S. 92, 97;
Good v. Hartford Acc., 39 F. Supp. 475, 477 (1941).

(a) The Circuit Court has, in effect, denied plaintiff his right of appeal by totally ignoring this strongly urged and important legal point although it was plainly set forth in his statement of points on appeal (R. 86), in each of his four briefs and in the petition for rehearing. (R. 117.) By failing to even consider this important question, the Circuit Court has deprived plaintiff of "due process" as he has never had a full and fair hearing on the merits of his appeal which has been decided adversely to him.

3. The Circuit Court's decision misunderstands and misapplies *Pullman v. Jenkins,* 305 U.S. 534, 537. (R. 115.) That case holds that when a petition for removal is filed, plaintiff's later amendments cannot be considered in determining the *"right of removal".* It does not *forever* forbid any amendments, after removal to the Federal Court, based upon *newly discovered evidence* or even changes in parties so as to *permit remand* when the situation so requires.

(a) The Circuit Court is in direct conflict with the following cases which hold that amendments may be made after removal to the Federal Court and when it *then* appears that there is no diversity of citizenship, a remand may be ordered, based on the record as it then stands:

Solanics v. Republic Steel, 34 F. Supp. 951, 953 (1940);

Polito v. Molasky, 8 Cir., 123 F. (2d) 258, 261 (1941).

(b) The Circuit Court is in conflict with the following cases holding that where the citizenship of a party showing no diversity is first discovered or raised in the District Court, amendment may be allowed, and the case remanded or dismissed.

St. Louis Smelting v. Nix, 8 Cir., 272 F. 977;

Page v. Wright, 7 Cir., 116 F. (2d) 449, 453-4 (Cert. dismissed in 312 U.S. 710) and which discusses the new Federal Rules of Civil Procedure, 12 (h) (2) and 15 (b), in deciding that "diversity of citizenship" is included in the word "jurisdiction".

(c) The Circuit Court's decision has, in effect, forever tied the District Court's hands on all motions to remand so that it can no longer inquire into the true facts and allow proper amendment, and it has thus nullified 28 U.S.C.A. Sec. 80, which requires the Federal Court, even of its own motion, and *"at any time"* to order remand when it should appear that it has no jurisdiction.

(d) The filing of the petition for removal here has, in effect, *dismissed* the action against said "conductor" and "officer", whereas, if it were not filed, plaintiff would be allowed to amend in either the Federal or State Court as a *matter of course* to set forth their true names and pursue his action against them.

(e) Said holding in *Pullman v. Jenkins,* supra, involves an important question of Federal law which should be clarified and settled by this Supreme Court to prevent further misunderstanding and confusion which is already apparent in this case and from the contents of the cases cited above, or much mischief and harm will result. A construction of 28 U.S.C.A. Sec. 80 and of Rules 12 (h) (2) and 15 (b) of the new Federal Rules of Civil Procedure are also involved here.

4. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(a) Reference is hereby made to statement of Circuit Court's actions at the oral argument, as appears supra on page 9 hereof, showing a prejudicial attitude on its part which deprived plaintiff of a fair hearing on the merits before a Court not biased against plaintiff's desire to exercise his clear legal right to try his case in the State Court.

(b) The bias of the Circuit Court is further shown by its opinion. Its statement that "appellant *threatened* to and did attempt to prosecute his suit in the

State Court" (R. 110) is unjustified as appellant positively never made any "threats" but merely acted in good faith and with proper decorum at all times in pursuing his legal rights as he understood them. Its statement that appellant "showed no cause" before the injunction was granted (R. 111) is error because he vehemently argued (R. 71, 72, 81), cited cases, and stated that since the question involved was a doubtful and technical one of construction, even discretion should withhold the injunction so that the State Court could apply its local laws to an interpretation of the complaint.

Its statement of "appellant being under the *delusion* that he could thereby defeat the District Court's jurisdiction" (R. 115) further indicates the Court's improper attitude towards appellant's efforts to freely pursue his legal rights.

5. It is important that the question of jurisdiction involved here be determined *finally* and *now* by this Supreme Court so that, after the effort, agony and expense of a trial and verdict for plaintiff in the District Court, he may not be told later by the Circuit Court, on appeal, that the District Court never had jurisdiction because the complaint showed no separable controversy and an agent of the defendant railroad company is also a local resident, thus establishing no diversity. This situation actually occurred very recently in *Cheyne v. Atchison, T. & S. F. Ry. Co.*, 9 Cir., 125 F. (2d) 49 (Rehearing denied Feb. 1942), and also in *Atchison, T. & S. F. Ry. Co. v. Francom*, 9 Cir., 118 F. (2d) 712 (1941). In both

of said cases remand was ordered to the State Court after the plaintiff had obtained a verdict in the District Court. What a waste of time, effort and money for the Courts, the parties, their counsel and all concerned!

Wherefore, petitioner respectfully prays that the writ of certiorari be allowed and that said decision be reviewed and reversed.

Dated, San Francisco, California,
April 29, 1942.

ALLEN SPIVOCK,
JOHN L. MURPHY,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

GILBERT E. THIEL,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY (a corporation), et al.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION OF THE COURT BELOW.

The Circuit Court's opinion is reported in ..... F. (2d) ..... and appears at pages 110 to 117 of the Record. The District Court's order with its citations denying the second motions to amend and remand appears on page 61 of the Record.

II. JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this Court appears on page 11 supra, and for brevity is not repeated here.

III. STATEMENT OF THE CASE.

A full statement of the case appears supra commencing on page 2, and for brevity is not repeated here.

IV. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming said decree of injunction thus holding that the District Court had jurisdiction and thus depriving plaintiff of his valuable right to proceed with his case in the State Court, and more particularly erred as follows:

1. The Circuit Court erred in holding that, on motion to remand, it could not be reasonably understood or inferred from the original complaint that said "conductor" and "police officer" were being sued as joint defendants or at least so intended by plaintiff.

2. The Court erred, on motion to remand, in closing its eyes to the uncontradicted evidence *in the record* AT THE TIME OF MOTION TO REMAND showing plaintiff's clear intent from the beginning to make said "conductor" and "officer" joint defendants. It looked only at the original complaint

and petition for removal and completely ignored plaintiff's answer to the petition for removal, his plea to the jurisdiction, defendant's answer to the complaint and its answers to interrogatories.

3. The Court erred in holding that *Pullman v. Jenkins,* supra, does not permit it, after removal, to consider any newly discovered or other evidence or permit appropriate amendment affecting jurisdiction even though the evidence clearly shows there was no diversity of citizenship from the beginning.

4. The Circuit Court's unfair remarks and hostile attitude towards plaintiff during the oral argument, simply because he desired to exercise his legal right to proceed with his case in the State Court rather than in the Federal Court deprived plaintiff of a fair hearing of his appeal before an impartial and unbiased Court.

V. ARGUMENT.

1. ATTEMPT TO STATE A CAUSE OF ACTION AGAINST "CONDUCTOR", "OFFICER" AND "DOES".

Surely, if the complaint does not technically state a cause of action against the "conductor", because the technical words "First Doe" or "defendant" were not immediately attached, a reasonably *liberal* construction shows at least that *some attempt* was made to do so by charging that he "saw plaintiff hanging from said window but negligently and carelessly failed to give the stop signal until after plaintiff had fallen to the ground". (R. 11.) In a suit

of this kind, is there anything unusual about naming a conductor and other agents of a railroad company as "Doe" defendants when plaintiff does not know their names and addresses?

Paragraph VI of said complaint (R. 11) actually does state a cause of action against said "Doe" defendants as it charges *all* defendants with definite joint negligent acts. Said cause of action may have been "imperfectly stated" but even by a strict interpretation it *cannot be denied* that at least *some attempt* was made to state a cause against them. Said paragraph is definitely not "meaningless", as the Circuit Court says, under any liberal interpretation of plaintiff's intent as surely there is some room for honest minds to differ about same.

Cella v. Brown, 8 Cir., 144 F. 742, and similar cases do not apply here firstly, because the facts differ and secondly, because plaintiff here has at least attempted to state a cause of action against the "conductor" as a "Doe" defendant who is not a mere *formal* party but a proper and necessary party who *cannot* be disregarded in the petition for removal even though he has *not been served* with summons and his *residence is not set forth.*

Pullman v. Jenkins, 305 U.S. 534, 540;
Grosso v. Butte Electric Ry. Co., 217 F. 422;
Jensen v. Safeway Stores, 24 F. Supp. 585;
Bagenas v. Southern Pacific Co., 180 F. 887, 889:

"It is true that it is held that a defendant sued purely by a fictitious name, *without other facts*

> *identifying him* as a proper or necessary party to the cause of action stated, will be regarded as a *formal* party merely, whose presence on the record, will not affect the right to removal by one otherwise entitled thereto. * * * But in the next place he was distinctly identified by express averment as the *conductor* of the offending train, and *as such a perfect cause of action was stated against him as a joint tort-feasor* with his co-defendant. * * * One may sue any or all of those jointly liable for a tort, and it does *not* lie with a defendant so sued to question the good faith with which his co-defendants have been joined, even though such joinder may appear to be for the very purpose of preventing a removal of the cause. (Citing.)"

The mere joinder of a resident agent of a defendant railroad company as a defendant does not constitute fraud.

Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152, 58 L. Ed. 544;

Martin v. Norfolk & W. Ry. Co., 8 Cir., 43 F. (2d) 293, 296;

Trivette v. C. & O. Ry. Co., 6 Cir., 212 F. 641, 643.

Plaintiff's motives in exercising his legal right to join a resident agent of a railroad company as a defendant cannot be questioned. (See cases on page 9 supra.)

The cases uniformly hold that on motion to remand, the complaint is most *liberally* construed with all inferences in favor of plaintiff to permit remand. (See cases on page 13 supra.)

In making a most strict and technical interpretation of said complaint, it is respectfully submitted that the Circuit Court is in conflict with the decisions above referred to.

---

2. TRUE FACTS IN RECORD COMPLETELY IGNORED.

Plaintiff's plea to the jurisdiction (R. 57) and his answer to the petition for removal (R. 54) created issues of fact to be tried *only* in the Federal Court. Plaintiff's said plea and answer clearly showed plaintiff's intent from the beginning to join the "conductor" and "officer" as defendants and also showed plaintiff's efforts to get information about them even from defendant Company which refused same at a time when plaintiff could have amended without leave of Court. (R. 58, 59, 2.) The burden of proof was upon defendant Company as petitioner to refute plaintiff's allegations but it offered none because plaintiff stated nothing but the truth. (See cases on pages 14, 15, supra.)

Good v. Hartford Acc. Co., 39 F. Supp. 475, 477 (June 1941), clearly covers the law applicable here:

> "If a removal is effected, the plaintiff may, by a motion to remand, plea, answer or traverse, take issue with the statements in the petition. If he does, the issues so arising must be determined by the District Court, and at the hearing the petitioning defendant must take and carry the burden of proof. Wilson v. Republic Iron & Steel Co., 257 U.S. 92."

Defendant Company's petition for removal easily recognized plaintiff's intent to charge "negligence of petitioner *and its agents,* as appears from the *complaint* herein". (R. 17.)

Defendant Company's answer had no difficulty whatever in identifying the specific "conductor" and "officer" from said complaint and admitted some of their acts as charged. (R. 30.)

Defendant Company's answer to plaintiff's interrogatories (R. 91-96) plainly show that the connection of said "conductor" and "officer" with the controversy here is real and they are not merely "formal" parties. They are *indispensable* and cannot be ignored and disregarded.

Both motions to remand were *specifically* based on all the above pleadings and papers, including said answers to interrogatories. (R. 37, 50.)

It is submitted that in closing its eyes to all this evidence *in the record* AT THE TIME OF MOTION TO REMAND, showing the true facts, the Circuit Court is in conflict with the above cases.

(a) Furthermore, in totally ignoring this strongly urged point, the Circuit Court has denied plaintiff "due process" as he was entitled to at least have the point considered and mentioned in the opinion which is adverse to him.

3. AMENDMENT IS ALLOWED AFTER REMOVAL AND REMAND IS THEN ORDERED.

It is respectfully submitted that the Circuit Court has definitely misunderstood and misapplied here the rule of *Pullman v. Jenkins,* supra. The facts of that case simply do not apply here as there were no plea, answer to the petition, answer to interrogatories or any matter of *evidence* before this Court. The only question was whether an amended complaint filed after the petition for removal could be considered in determining *"the right of removal"* to the Federal Court. Obviously, it could not. This rule was already well established and was based on the cited cases. The Supreme Court was merely considering the motion to remand as a *demurrer* to the petition for removal as is stated in *Farmers Bank v. Atchison, T. & S. F. Ry.,* 8 Cir., 25 F. (2d) 23, 27, and *Leonard v. St. Joseph,* 8 Cir., 75 F. (2d) 390, 395. It was *not* confronted with any *issues of fact* on said petition or any *later discovered* evidence in the Federal Court showing an intent and attempt to name a "Doe" defendant and discovery of no proper diversity of citizenship.

The *Pullman* case does *not* hold that evidence *first discovered in the Federal Court after removal* cannot be considered or amendment allowed on *motion to remand.* It does *not* hold that when plaintiff files an answer to the petition for removal that the District Court cannot consider evidence or allow amendment in determining a *motion to remand.*

While a removal may be entirely proper *at the time* the petition is filed, subsequent discovery of evidence

and other matters *then in the record* and before the Court may permit amendment and compel a remand *"at any time"*.

(a) *Solanics v. Republic Steel,* 34 F. Supp. 951, 953 (1940), discusses said *Pullman* case and says:

> "It seems to this court that the language of the Supreme Court to the effect that federal jurisdiction will not be affected by amendment of pleadings after removal, must be restricted to the specific facts of the cases in which such language was used."

Also, *Polito v. Molasky,* 8 Cir., 123 F. (2d) 258, 261 (Nov. 1941), mentions said *Pullman* case and it would permit amendment, after removal, when it *then* appears that there is no diversity and, when the evidence is sufficient, it would order remand.

Similarly, when, after removal, there ceases to be a separable controversy by reason of amendment of the pleadings so that there is *then* no diversity, remand to the State Court is proper.

Highway Const. Co. v. McClelland, 8 Cir., 15 F. (2d) 187, 188 (Cert. denied in 273 U.S. 765);

St. Paul v. Cab Co., 303 U.S. 283, 295.

(b) The following cases hold that where the citizenship of a party showing no diversity is first discovered or raised in the District Court, amendment may be allowed and the case remanded or dismissed, and neither party may waive the question of jurisdiction by laches, consent or estoppel, and the District Court has no "discretion" to deny the amendment:

St. Louis Smelting v. Nix, 8 Cir., 272 F. 977; *Page v. Wright,* 7 Cir., 116 F. (2d) 449, 453-4 (1940).

Said *Page v. Wright* holds on page 454 that under Rule 12 (h) (2) of the new Federal Rules of Civil Procedure (1938) the defense of no "jurisdiction" which is never waived includes the objection of no "diversity of citizenship" and said rule refers to Rule 15 (b) which permits an amendment to conform to evidence "at any time, even after judgment".

(c) The Circuit Court has nullified 28 U.S.C.A. Sec. 80, which requires the Federal Court of its own motion and "at any time" to order remand when facts showing no jurisdiction are presented. Its decision here forever ties the District Court's hands on all motions to remand so that it can never look into the true facts between the parties but must look only to the original complaint and the petition for removal.

(d) When a petition for removal is filed, plaintiff can no longer amend his complaint in the State Court. His hands are tied by the *rules of procedure* until the transfer to the Federal Court is completed, as the cases cited above indicate. However, he should not, thereby, be deprived of his *ordinary rights* to make any *reasonable amendments* to his complaint. If the petition for removal had not been filed, plaintiff could, at that time, and as a *matter of course,* amend his complaint, setting forth the true names, if known, of said "conductor" and "officer" as joint defendants. Does it not then seem strange that the mere filing of

said petition should here deprive him of such right and actually cause an involuntary *dismissal* against said agents?

The new Federal Rules of Civil Procedure, Rule 15 (a) and (c) thereof, freely permit amendments and they relate back to prevent the bar of the statute of limitations when they arose out of the occurrence "*attempted* to be set forth in the original pleading".

It is the well established rule of the California Courts that amendments be allowed with "great liberality" and where a "bona fide attempt" is made to state a cause of action against a party but which fails because of "some imperfections", it may be remedied by amendment which relates back to avoid the statute of limitations, as is stated clearly in *Day v. Western Loan,* 42 Cal. App. (2d) 226, 108 Pac. (2d) 702 (Hearing denied by California Supreme Court in 1941). Said case most liberally interprets Code of Civil Procedure Section 474, which allows a defendant whose name is unknown, to be sued by "any name", with subsequent amendment.

Furthermore, the alleged bar of the statute is a personal defense which may be raised or waived only by said agents and not by defendant Company. 16 *Calif. Juris.* 412, Sec. 23.

In view of the above, it is submitted that the California cases cited by the District Court (R. 61) are definitely not in point here.

4. BIAS OF CIRCUIT COURT.

The statements and conduct previously set forth showing the bias of the Circuit Court need not be repeated here. It is submitted that they urgently call for supervision by this Supreme Court and a review should be granted, if plaintiff's appeal is to receive a fair hearing by an unprejudiced Court.

CONCLUSION.

Under the peculiar circumstances presented here, it would seem apparent that plaintiff is entitled to at least some equitable relief to prevent him from being deprived of his valuable right to proceed in the State Court. He is most sadly crippled for life and the issue here is of such *extreme importance* to him that he has been forced to come to this Supreme Court as the Court of last resort to protect his right.

It is submitted that strict technicalities without any consideration of the true facts before the Court should not be allowed to prevail in this day of modern justice.

Wherefore, petitioner prays that the writ of certiorari issue as prayed and that said decision be reviewed and reversed.

Dated, San Francisco, California,
April 29, 1942.

Respectfully submitted,
ALLEN SPIVOCK,
JOHN L. MURPHY,
Counsel for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of April, 1942.

_____

Counsel for Respondent.

Subject Index

	Page
No Ground for Issuance of a Writ of Certiorari Is Shown...	1
I. The facts	2
The complaint	2
Petition for removal	4
Later steps	4
II. Legal propositions	6
Under the California cases no defendant was joined other than respondent	7
No cause of action was stated except as to respondent	8
The right to remove depended on the pleadings as they stood when the petition for removal was presented	9
Unnamed and unidentified "defendants" must be disregarded	10
Attempts to add parties after removal can not defeat the removal	11
Conclusion	12

Table of Authorities Cited

	Pages
Bachman v. Cathry, 113 Cal. 498, 45 P. 418	8
Bagenas v. S. P. Co., 180 F. 187, 191 (N. D. Cal. Van Fleet)	10
Barney v. Latham, 102 U. S. 205, 213, 26 L. ed. 514, 517	9
Bernheim v. Louisville Pottery Co., 221 F. 273	9
Buckley v. Gray, 110 Cal. 339, 343, 344, 22 P. 900	9
Burlingame v. Justice's Court, 1 C. 2d 71, 74, 33 P. 2d 669	8
Burt v. Mo. P. R. Co., 294 F. 911, 915	10
California CCP §474	7
Cella v. Brown, 144 F. 742, 764 (CCA 8, cert. den. 202 U. S. 620, 50 L. ed. 1174)	10
Chicago etc. Co. v. Mining etc. Co., 29 F. 337	9
Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041	11
Dahms v. Gen. Elev. Co., 214 Cal. 733, 737, 7 P. 2d 1013	9
Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845	11
Gates v. Wendling Nathan Co., 27 C. A. 2d 307, 315, 81 P. 2d 213 (hr. den.)	8
Gibson v. C. & O. Ry. Co., 215 F. 24, 26 (CCA 6)	10
Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 467	9
Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93	11, 12n
Iowa C. R. Co. v. Bacon, 236 U. S. 305, 309, 59 L. ed. 591, 593, col. 2	5n
Jacobson v. N. W. P. R. Co., 175 Cal. 468, 472, 166 P. 3	9
Kallen v. Serreto, 126 C. A. 548, 549, 14 P. 2d 417 (hr. den.)	8
King v. City of Beaumont, 296 F. 531	9, 10
Kirby v. American Soda F. Co., 194 U. S. 141, 48 L. ed. 11	9
Knight v. Atl. C. L. R. Co., 73 F. 2d 76 (CCA 5)	10
Lang v. Lilley & Thurston Co., 20 Cal. App. 264, 128 P. 1031	8
L. & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475	10
Luddington E. Co. v. L. A. Fortuna M. Co., 4 C. A. 369, 88 P. 290	8

Pages

Madisonville T. Co. v. St. Bernard N. Co., 196 U. S. 239, 49 L. ed. 462 9
Means v. So. Cal. Ry. Co., 144 Cal. 473, 478, 77 P. 1001 8
Mercantile Trust Co. v. Stockton etc. Co., 44 C. A. 558, 186 P. 1049 7

People v. Fortuna Estates, 279 F. 500, cert. den. 257 U. S. 578, 66 L. ed. 1077 ..... 12n
Peters v. Plains Petroleum Co., 43 F. 2d 49 (CCA 10) 10
Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888 ..... 11, 12n
Plunkett v. Gulf Refining Co., 259 F. 968, 973 10
Prendergast v. Mitchell-Silliman Co., 65 C. A. 456, 458, 224 P. 243 (hr. den.) 8
Probst v. Cowan, 91 F. 929 ..... 9, 12n
Puerto Rico v. Remos, 232 U. S. 627, 58 L. ed. 763, 765 .... 11, 12n
Pullman Co. v. Jenkins, 305 U. S. 534, 83 L. ed. 334, 338 ..... 9, 11, 12n

Rivers v. Bradley, 53 F. 305 ..... 9, 10

Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 68 L. ed. 628 9
Schmidt v. Bauer, 80 Cal. 565, 22 P. 256 8
South v. San Benito, 40 C. A. 13, 19, 181 P. 845 8
Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329 ..... 9, 11, 12n
St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U. S. 283, 294, 295, 82 L. ed. 845, 851, 852 ..... 10, 12

Union Tank etc. Co. v. Mammoth Oil Co., 134 C. A. 229, 25 P. 2d 262 7

Yuba Co. v. North American etc. Co., 12 C. A. 223, 107 P. 139 (hr. den.) 8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1206

GILBERT E. THIEL,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The petition fails to show a case for issuance of the writ within Rule 38 of this Court. **The only question presented is that of the construction and effect of a complaint filed in the State Court.** The question is one of State law. **The State Court** (R. 26, 27), **the District Court** (R. 49, 61, 71-82), **and the Circuit Court of Appeals** (R. 109-117) **all agreed** that no defendant was joined against whom a cause of action was stated, except Southern Pacific Company; that no cause of action was stated against any "Doe" and the complaint failed to proceed far enough to make any "Doe" a party; that there was no attempt to make anyone else a party; that no conductor or police officer or "other agent" had been sued; that as between plaintiff and Southern Pacific Company there was diversity of citizenship,

and that, accordingly, the cause was properly removed to the Federal Court.

I.

THE FACTS.

Petitioner's complaint (R. 9 *et seq.*), after the title of court, was captioned and read as follows:

> "GILBERT E. THIEL, Plaintiff, vs. SOUTHERN PACIFIC COMPANY, a corporation, FIRST DOE, SECOND DOE and THIRD DOE, Defendants.
>
> COMPLAINT FOR DAMAGES
> (Personal Injuries)
>
> "Plaintiff complains of **above**[1] defendants and alleges:
>
> I.
>
> "That plaintiff does not know the true names of **defendants sued herein as 'Does'**[2] and prays leave to insert same when ascertained."

There is no other reference to any "Does". No "Doe" is said to be an employee of Southern Pacific Company, or identified with either the plaintiff or the defendant. No "Doe" is described, either by anything he did or any position he held. **Named in the caption and in Paragraph I, Does are thereafter disregarded.**

It is alleged that Southern Pacific Company received certain information "through one of its regularly uni-

1. The only defendants complained of, the only defendants joined and sued, are those referred to "above" i.e. **in the caption.** No other persons, mentioned in the complaint, are "complained of."

2. Sued as "**Does**"; **not** sued by some other name; **not** sued as "other agent" or "special police officer" or "conductor" or "porter" or **by any other** designation **or description.**

formed special police officers,[3] and other of its agents''[4] (R. 10, 11); that **one of** ''defendant company's regular conductors **on** said train''[5] negligently failed to give a stop signal when he saw plaintiff hanging from a window.

Paragraph VI of the complaint (R. 11) alleges:

> ''That said fall was caused by the carelessness and reckless conduct of said defendants, **who, with full knowledge of plaintiff's said condition, accepted him as a passenger** and then carelessly and recklessly failed to take any reasonable precautions for his safety.''

This is the only reference to plural defendants, or to any defendant other than respondent.[6] The reference to defendants is a reference to persons sued, ''Does''. It is reference only to persons who accepted plaintiff as a passenger and who had certain knowledge. It is not alleged that any agents referred to accepted plaintiff as a passenger. It cannot refer to the conductor, because it is a reference to defendants who ''with full knowledge of plaintiff's said condition'' accepted him as a passenger. There is no allegation that any conductor had any knowledge of any condition of the plaintiff.

The ''Does'' are not characterized or identified. Offhandedly thrown into the caption and Paragraph I, they

3. The officer is not designated as a defendant or as a "Doe."

4. Not designated as defendants or "Does" or otherwise identified, although if a claim is made that a police officer or a conductor was joined the claim could equally well be made for an indefinite number of other unidentified agents of the railroad. The interrogatories fished to see what "other agents" there were (R. 94, 95) who might then be claimed to have been intended all the time in the effort to defeat removal.

5. The "Company" is called "defendant" but, *ex industria*, the conductor is not. Apparently there were several conductors on the train. (Interrogatories 67 and 68.) It is not alleged the conductor referred to was on duty or in charge of the train; he was only **one of** respondent's conductors.

6. Except in the caption and prayer.

are thereafter forgotten. They are not even identified as employees of respondent. The complaint not only shows ignorance of names, but makes no attempt to identify. Indeed, one of plaintiff's papers says their "identities" as well as their "names" were unknown. (R. 54) The complaint was insufficient to state a claim against anyone (other than Southern Pacific Company) even if sued by his true name.

At no place is a special officer or conductor called a defendant. At no place is any "Doe" said to be a conductor or police officer. At no place is a conductor or police officer said to be a "Doe". No one of the "Does" is any more identified as a conductor or police officer than as any "other of its (respondent's) agents".

The Petition for Removal unmistakably stated:

> "It is impossible to tell from said complaint, or otherwise, what individuals are referred to by said fictitious designations "First Doe, Second Doe and Third Doe", or any of them. Said complaint *does not state a cause of action against said fictitiously designated defendants*, or any of them, nor does it state a claim upon which relief can be granted against said defendants, or any of them, and in truth and in fact *no person or persons is or are made defendant or defendants herein other than Southern Pacific Company.* **No other person is mentioned in the complaint as a defendant or otherwise as a party.**"

This is **not** a case where the State Court refused to remove. The State Court made a formal order of removal

expressly finding the petition to be true. (R. 27)[7] It held that there was no other defendant than respondent.

After removal to the District Court, petitioner filed interrogatories. They were not confined to inquiries about policemen or conductors (R. 91-96), but made inquiry as to ticket sellers and other agents and employees.[8] The answers showed that the conductor in charge of the train was a California resident. From **then** on, but **only from then** on, special policemen, ticket sellers and "other agents" were forgotten. The California resident, it is **now** discovered, was—so we are told—First Doe all the time!

Two attempts were made to amend the complaint. For two reasons these are of no consequence. In the first place, leave to amend was denied. In the second place, even had leave to amend been granted, the changes made could not be considered in determining the right of removal. It was to be determined on the complaint as it read when the petition and bond for removal were served, filed and presented to the State Court.

The petition here makes some reference to claimed conduct of the District Court and the Circuit Court of Appeals. The statements can be identified readily by want of supporting reference to the record. They are not

7. The state court had authority to determine the meaning and effect of the complaint. This was a question of state law. See *Iowa C.R. Co. v. Bacon*, 236 U.S. 305, 309, 59 L. ed. 591, 593 col. 2.

The petition for certiorari says (p. 4) that the state court made its order for removal "over the formal objection of plaintiff." This is hardly accurate. (R. 24-27)

8. Inquiry was made as to the identity and residence of the special policeman, identity and residence of the conductor in charge of the train, identity of any agent who might have given the conductor information, identity and residence of a ticket seller, identity of an agent to whom a ticket seller may have reported information, and identity of other conductors (plural) or employees of respondent aboard the train. (R. 91-95)

deemed of consequence, but they are not true. We state this that there may be no claim of acquiescence by silence.

II.

LEGAL PROPOSITIONS.

A very short answer to the petition is that the "Doe" defendants are to be disregarded because they were "fictitious" in the full sense of the term. No cause of action was stated against any one of them. The special police officer, the conductor, and the other agents were not sued or made defendants. It is not the law of California, and the Federal cases and statutes do not contemplate, that a plaintiff may file an open end complaint, so far as parties are concerned, and after proper removal, ask to remand if he finds some person who had some connection with the transaction and who is a citizen and resident of the same State.

A person not sued by name is not a party unless he is so far described in the complaint that only he fits the description. Reference in a complaint which may apply to a dozen people does not make any one a party. The situation here is wholly different from that presented by a complaint which joins a party by a fictitious **name** and identifies him as a particular porter, or the conductor of a particular train, or the engineer of a particular train; so far identifies the person that it is clear from from the face of the complaint that the fictitious **name** is intended to apply to a definite person.

California permits an action against a person whose **identity** is known, but whose **name** is unknown. Such per-

son may be sued by a fictitious name. It does not permit the filing of a complaint reciting a series of fictitious names in the caption without identity of the persons intended to be sued. Unless the person sued by such name is so far identified that it is clear from the face of the complaint that a particular person, susceptible of being found by description, and who could recognize himself, was intended, no one is joined by such fictitious names.

California CCP §474;[9]

Mercantile Trust Co. v. Stockton etc. Co., 44 C.A. 558, 186 P. 1049;[10]

Union Tank etc. Co. v. Mammoth Oil Co., 134 C.A. 229, 25 P.2d 262;[11]

---

9. "Suing a party by a fictitious name, when allowed. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

10. Fictitious names were used, but there was no identification or description. One Nesbitt, claiming to be First Doe, appeared. His appearance was stricken on motion. The court said:

"The purpose of this section is obvious from the reading. Cases may arise and do arise *where the plaintiff has in mind a person* he deems a proper or necessary party defendant, but of whose true *name* he is ignorant. In such case, he may bring his suit, alleging the fact of his ignorance of the true *name* of the party, and designating him by any name, and when his true name is ascertained amend his pleading by inserting it therein, but it must be a genuine case of ignorance of the true *name* of the party. * * * It must be apparent that if the plaintiff has not in some way made Mr. Nesbitt a party to the action he had no right to appear therein by demurrer. He was not by name a party to the suit, and he was not served as one of those sued by a fictitious name. *It was for the plaintiff to make known in some way the real persons whom he desired as defendants, and whom he sued by fictitious name.*"

11. Doe Defendants were named, and it was stated they claimed some interest in the premises in question. After the period of limitations had expired, it was sought to hold some persons claiming they were sued by fictitious names. The court held against this. "The filing of the original complaint stopped the running of the statute only as to those who were made party defendants thereby, but the statute continued to run in favor of others until made parties to the action. We cannot say that the respondents were made party defendants by the filing of the original complaint. * * * *The mere intention of the appellant to sue the owner of the property, whoever he may be, is not sufficient.* In order to give effectiveness to allegations pertaining to fictitious defendants, *the plaintiff must designate the persons* to whom he refers by either, and properly by both, the service of summons or appropriate amendment."

Gates v. Wendling Nathan Co., 27 C.A.2d 307, 315, 81 P.2d 213 (hr.den.);[12]

Burlingame v. Justice's Court, 1 C.2d 71, 74, 33 P.2d 669;[13]

Kallen v. Serreto, 126 C.A. 548, 549, 14 P.2d 417, (hr.den.);[14]

Prendergast v. Mitchell-Silliman Co., 65 C.A. 456, 458, 224 P. 243 (hr.den.);

South v. San Benito, 40 C.A. 13, 19, 181 P. 845;

Luddington E. Co. v. L. A. Fortuna M. Co., 4 C.A. 369, 88 P. 290;

Bachman v. Cathry, 113 Cal. 498, 45 P. 418;

Yuba Co. v. North American etc. Co., 12 C.A. 223, 107 P. 139 (hr.den.).

It is equally clear that even where persons are sued by their true names, no cause of action is stated against them unless such facts are alleged as to show a duty and its breach. A mere statement that a person acted negligently or carelessly or recklessly states no cause of action.

Means v. So. Cal. Ry. Co., 144 Cal. 473, 478, 77 P. 1001;

Schmidt v. Bauer, 80 Cal. 565, 22 P. 256;

Lang v. Lilley & Thurston Co., 20 Cal.App. 264, 128 P. 1031;

---

12. Another statute of limitations case. It was said that the statute was not tolled by the use of a fictitious name, where as to such "defendant" the "only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it".

13. "In order that he be made a party to the action, it was necessary that he be sued or be intended to be sued *as disclosed by the record*, and generally that jurisdiction of his person be acquired * * *."

14. This case, and the following cases hold that under the California statute for change of venue from one county to another county, defendants not sued by their true names, not designated in the complaint by description, and not specified by the service of summons, must be disregarded. In the *Kallen Case*, the court said that "fictitious defendants who have not been brought into court are not to be regarded in consideration of a motion for a change of venue".

Dahms v. Gen. Elev. Co., 214 Cal. 733, 737, 7 P.2d 1013;

Buckley v. Gray, 110 Cal. 339, 343, 344, 22 P. 900;

Jacobson v. N.W.P.R. Co., 175 Cal. 468, 472, 166 P. 3;

Rivers v. Bradley, 53 F. 305.[15]

If an action is removable, presentation of a sufficient petition and bond works a removal without more. Removability is determined on the face of plaintiff's complaint, i.e., on the pleadings as they stand at the time of presentation of the petition. The cases are legion. We cite only a few of particular interest:

Madisonville T. Co. v. St. Bernard N. Co., 196 U. S. 239, 49 L. ed. 462;

Barney v. Latham, 102 U. S., 205, 213, 26 L. ed. 514, 517;

Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 68 L. ed. 628;

Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 467;

Pullman Co. v. Jenkins, 305 U. S. 534, 83 L. ed. 334, 338;

King v. City of Beaumont, 296 F. 531;

Bernheim v. Louisville Pottery Co., 221 F. 273;

Probst v. Cowan, 91 F. 929;

Chicago etc. Co. v. Mining etc. Co., 29 F. 337;

Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329;

Kirby v. American Soda F. Co., 194 U. S. 141, 48 L. ed. 11;

---

15. Held that "the facts showing such a duty on his part, and the breach of it, must be alleged; * * *. The bald charge that plaintiff was injured by his negligence is simply the statement of a conclusion without the fact to base it upon." Further held that the person referred to was to be disregarded on the question of removability from state to Federal court.

Cella v. Brown, 144 F. 742, 764 (CCA 8, cert. den. 202 U. S. 620, 50 L. ed. 1174);

L. & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475;

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U. S. 283, 294, 295, 82 L. ed. 845, 851, 852.

It is a necessary corollary that the Court must disregard persons against whom no cause of action is stated at the time the petition for removal is presented, including "fictitious defendants"; must disregard fictitious names where the person intended is not identified, and the name could just as well be claimed to fit one as another person. Removal cannot be defeated by a claim that some particular person was intended when nothing appears on the face of the complaint to point this out.

Burt v. Mo. P. R. Co., 294 F. 911, 915;

Peters v. Plains Petroleum Co., 43 F.2d 49 (CCA 10);

Cella v. Brown, 144 F. 742 (CCA 8), cert. den. 202 U. S. 620, 50 L. ed. 1174;

Knight v. Atl. C. L. R. Co., 73 F.2d 76 (CCA 5);

Plunkett v. Gulf Refining Co., 259 F. 968, 973;

King v. City of Beaumont, supra;

Bagenas v. S. P. Co., 180 F. 187, 191 (N. D. Cal. Van Fleet);

Gibson v. C. & O. Ry. Co., 215 F. 24, 26 (CCA 6);

Rivers v. Bradley, supra.

This case is wholly unlike *Pullman Co. v. Jenkins*, supra. That was not a case of a mere tossing in of a fictitious name, to be applied at will by the plaintiff to someone he might later select. The individual was identified. "His relation to the Pullman Company and his

negligence as its servant were fully alleged". (1) The defendant sued by a fictitious name was identified as a particular Pullman porter. No other person in the world fitted the description. (2) His relation to the Pullman Company as an employee was stated (a duty was shown). (3) He was specially charged with negligence. No one of these things was done in the case at bar.

In the case at bar situation is not one of suing a given person whose name is unknown, so that he is sued by a fictitious **name**, but more properly this is an attempt to defeat removal through fictitious **persons.**

The attempted amendments are false quantities. They were not allowed. Secondly, removability is to be determined by the pleadings as they stand at the time the petition is presented.

See in addition to the cases above, the following:

Pullman Co. v. Jenkins, supra;
Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329;
Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888;
Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93;
Puerto Rico v. Remos, 232 U. S. 627, 58 L. ed. 763, 765;
Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845;
Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041.

No time need be spent on the cases cited in support of the petition. None support the proposition that this case should have been remanded. There are some few cases in which the change of condition after proper removal to the Federal Court warrants a remand. These seem to be cases in which Constitutional ground of jurisdiction of the Federal Court is wholly removed. But no large time

need be spent in distinguishing these cases. The necessary distinctions were made and the question put at rest in *St. Mercury Ind. Co. v. Red Cab Co.*, supra.[16]

CONCLUSION.

The long and short of this case is that it involves only a construction of plaintiff's complaint. The State Court and the Courts below were in accord as to this construction.

It is respectfully ~~admitted~~ submitted that the petition should be denied.

Dated, San Francisco, California,
May 13, 1942.

ARTHUR B. DUNNE,
Attorney for Respondent.

16. Whatever may be true of other amendments, amendments adding new parties after removal are to be disregarded on the question of remand. *Probst v. Cowan, supra; Pullman Co. v. Jenkins, supra; Stewart v. Dunham, supra; Phelps v. Oaks*, 117 U. S. 236, 29 L. ed. 888; *People v. Fortuna Estates*, 279 F. 500, cert. den. 257 U. S. 578, 66 L. ed. 1077. Cf. *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93; *Puerto Rico v. Remos, supra.* The *Pullman Case* would seem definitely to settle the question.